

Mediation Lawyering - the new legal specialisation

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It is a fact of life that lawyers will be involved in many mediations, particularly where they involve litigation matters. Despite initial reluctance to embrace mediation, the tide is turning as Sabine Walsh explains in her posting, Of Turkeys and Christmas - The Role of Lawyers in Mediation. A specialised form of legal practice is developing, known variously as mediation lawyering, mediation advocacy or mediation representation.

In many jurisdictions there are specific obligations on lawyers in terms of statutes, rules of court and lawyer codes of conduct applicable in mediation. These obligations may relate to how to oppose a proposed court referral to mediation, whether to make representations for a different form of dispute resolution such as neutral evaluation, good faith participation in mediation, and the extent to which clients must be informed about, and prepared for, mediation and other dispute resolution options. For example, in Australia the Civil Dispute Resolution Act 2011 requires lawyers to:

1. advise clients of the requirement to file a statement to the effect that they, the clients, have taken genuine steps, such as mediation, to resolve the dispute; and
2. to assist clients in doing so.

In England and Hong Kong, court practice directions require lawyers to advise and assist their clients in relation to the latter's obligation to reasonably engage in mediation. In the American case of *Doorstop Beverages of Longwood Inc v Collier* (928 So 2d 482 Fla Dist Ct App 2006), the court imposed sanctions on the client's legal representative for the failure of the client to appear at mediation in circumstances in which the lawyer had failed to advise his client that the client's attendance was required.

Further forms of pre-mediation assistance that lawyers can offer relate to the issue of appropriate timing in venue, the identity of the mediator, the most suitable practice model of mediation, the pre-mediation exchange of information and client preparation for the process. In addition, legal advisers can assist the mediator and the mediation process in a variety of ways: in managing their clients expectations, in keeping lines of communication open, in acting as constructive negotiators and inserting as reality agents when they know their clients is being unrealistic. Experienced mediators know the wisdom of using the potential resource of mediation lawyers to the greatest extent possible.

The new reality affords lawyers wide scope to advise in relation to mediation and suggest it to the other side without concerns about weakening their bargaining position. At the same time, mediation lawyering involves a significant paradigm shift for trial lawyers and poses challenges to lawyers in terms of their role and skills as mediation lawyers.

It's a multi-dimensional shift from:

- the adversarial to the collaborative;
- win-lose to win-win;
- a past focus to a future focus;
- a focus on lawyers in the trial process to a focus on parties in the mediation process; and
- the need to convince a third-party umpire to the need to reach a consensus with the other side in relation to a resolution of the dispute.

The skills of mediation lawyering differ greatly from trial lawyering. In this context Sabine Walsh calls on mediators "to open up the world and practice of mediation to lawyers and to work collaboratively with them in order to maximise the outcomes for our clients." This is vital. But is it enough? Education and training are also required to support the cultural shift needed in the legal profession. To this end, training courses supported by a growing body of research have begun to develop around the specialisation of mediation lawyering. Law societies and Bar associations have been among the first to offer continuing legal education (CLE) on mediation lawyering - and there is room for much more in this regard. Medium to large size law firms can also go a long way to support this culture change by including mediation lawyering as part of their in-house training offerings.